No. 12,680

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

A. LESTER MARKS, ELIZABETH LOY MARKS, and HERBERT M. RICHARDS, Trustees of the Estate of L. L. McCandless, Deceased,
Appellees.

Upon Appeal from the United States District Court for the Territory of Hawaii.

BRIEF FOR THE UNITED STATES, APPELLANT.

A. DEVITT VANECH,
Assistant Attorney General,
FRED K. DEUEL,
Special Attorney, Department of Justice,
Honolulu, T. H.,
JOHN F. COTTER,
EDMUND B. CLARK,
Attorneys, Department of Justice,
Washington, D. C.,
Attorneys for Appellant.

Subject Index

Table of Authorities Cited

Cases

Statutes

Miscellaneous

No. 12,680

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

A. LESTER MARKS, ELIZABETH LOY MARKS, and HERBERT M. RICHARDS, Trustees of the Estate of L. L. McCandless, Deceased,
Appellees.

Upon Appeal from the United States District Court for the Territory of Hawaii.

BRIEF FOR THE UNITED STATES, APPELLANT.

OPINION BELOW.

The District Court did not write an opinion.

JURISDICTION.

The jurisdiction of the District Court was invoked under Section 1 of an Act approved June 29, 1948, which is set forth in the statement at pp. 2-3, *supra*. The District Court's judgment was entered April 19, 1950 (R. 18-19). An amended judgment was entered

April 25, 1950 (R. 19-20). Notice of appeal was filed June 16, 1950 (R. 20). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1291.

QUESTIONS PRESENTED.

1. Whether damages to and loss of personal property resulting from preparations for the defense of Hawaii on and immediately after December 7, 1941, "arose out of the combat activities of military personnel of the United States."

2. Whether lands ceded to the United States by the Republic of Hawaii under the joint resolution of annexation and in the custody of the Territory pursuant to Section 91 of the Organic Act may be withdrawn for the use of the United States Army without liability to those holding leases from the territory.

3. Whether the United States could set-off the value of improvements made by it for the benefit and at the request of the lessees against damages which might be awarded for termination of the leases.

STATEMENT.

Section 1 of an Act approved June 29, 1948 (R. 4-5) provides:

> That jurisdiction is hereby conferred upon the District Court of the United States for the Territory of Hawaii to hear, determine, and render judgment upon the claims of the executors and trustees of the estate of L. L. McCandless [plain-

> tiffs below and appellees here], deceased, as their interests may appear, against the United States of America for damages, if any, but not exceeding the sum of $46,155, for the loss of personal property including the loss of livestock, alleged to have been caused by military personnel of the United States, and for damages, if any, but not exceeding the sum of $67,500 for the alleged illegal withdrawal of the Government lands covered by General Leases Numbers 1740 and 1741 of the Territory of Hawaii, each dated December 29, 1925, from the operation of those leases for use by the United States Army for war purposes: Provided, That judgment shall not be rendered against the United States with respect to any part of the alleged damages for the loss of personal property, including livestock, which arose out of the combat activities of military personnel of the United States.

Section 2 provides:

> Proceedings for a determination of these claims shall be had in the same manner as in cases against the United States of which the district courts of the United States have jurisdiction under the provisions of section 24 of the Judicial Code as amended [now 28 U.S.C. section 1346].

By virtue of that Act this suit was commenced December 29, 1948 (R. 5). The amended complaint (R. 12-13) alleged, first, that plaintiffs had sustained a loss of $46,155 because on December 7, 1941 "and immediately subsequently" Army personnel took possession of their Oahu ranch and, by reason of the destruction of fences, paddocks and corrals, caused

the livestock to scatter over the countryside (R. 12) and, second, that plaintiffs had sustained a further loss of $67,500 because Lease No. 1740, which ran until December 29, 1946, was wrongfully cancelled as of June 29, 1942, and Lease No. 1741, which had the same expiration date, was wrongfully cancelled as of December 29, 1942 (R. 12-13). The answer of the United States (R. 8-10) denied liability and asserted that, against any damages awarded for cancellation of the leases, there should be set-off the sum of $23,-868.52 it had spent in construction work on other lands owned by plaintiffs in connection with their removal from the leased lands. As required by Section 2 of the jurisdictional Act, there was a trial before the district judge.

1. The testimony in respect of the damages to livestock may be summarized as follows:

On December 7, 1941, the leased areas—4783.88 acres[1]—together with some land owned by the estate, was used as a ranch. The leased land was improved by a dwelling house and a small guest cottage. There were also fences and water troughs (R. 43). The livestock consisted of an estimated 1200 cattle (R. 46), 200 pigs (R. 53) and two horses (R. 52). Immediately after December 7, 1941, 15 soldiers, two non-commissioned officers, and a second lieutenant entered the property (R. 127, 275). They strung barbed wire on the beach and erected gun emplacements (R. 128, 275). On December 14, another detachment went in

[1]Originally, the leases covered 4792.72 acres (R. 3) but 8.84 acres were withdrawn in 1929 by executive order (R. 102).

for the purpose of patrolling the area back of the beach (R. 274). It comprised about 75 men, some of whom were attached to the mule train which brought in supplies (R. 277).

About December 17, Mr. Marks, one of the appellees and their only important witness on the issues now material, got up to the ranch for the first time since the attack. He testified: "The troops were occupying most of the available houses. They were busy putting up barbed wire entanglements. They had torn down fences and were using any available material that could be used in the creation of their defensive positions [R. 47]. * * * there was an [expectancy] of an attack down there, and they were taking all material that they could get hold of, and every precaution that they could to be prepared for it" (R. 48-49).[2] However, as a result: "The fences were down. The wires had been cut. The pipe lines taking water to the troughs had been cut. In two instances * * * the troughs had been turned over, and in another instance where there was a permanent concrete watering trough a machine gun had been used to shoot the corner off of it. They seemed to think that mosquitoes were breeding in it." (R. 48). And, Mr. Marks added,

---

[2]Colonel Kendell J. Fielder, at the time in charge of military intelligence in the Islands (R. 139) testified that after December 7, 1941, the Army "thought it was possible that raids might be attempted by the Japanese to say the least. An all-out invasion to capture the islands seemed not too probable, but possible. After all, the military didn't think that the Japs would attack the place in the first place, so they felt there was always a threat of an attempted invasion [R. 140]. * * * There was definitely anticipation of raids, agents being landed from submarines, air tights and the like" (R. 141).

the cattle "just were dispersed" (R. 49); 200 pigs "just disappeared" (R. 53) and two saddle horses went through a cut fence onto a railway track and were killed (R. 52; see also R. 128).

Mr. Marks further testified that the Army had in the ranch area "trucks and tanks and all manner of motor vehicles" (R. 51) "gun emplacements and pill boxes and anti-aircraft locations" and troops "deployed over the entire area" (R. 52). This testimony indicates the presence of many men and much activity. But the witness does not fix the time when these conditions existed and it is plain they could not have existed very soon after the attack on Pearl Harbor. Then there were no vehicles "because [in the words of the sergeant in charge of the patrol] you cannot get in that area with vehicles. Later on the Army engineers built a road * * * (R. 279)." By the spring of 1943, the patrol had set up two observation posts, six machine gun positions and two mortar positions (R. 274). It was almost six months before the detachment on the beach amounted to a full company (R. 127). The 75-man patrol did not increase in strength. Additional soldiers were not moved in until training operations began in the area (R. 278) late in 1942 (R. 277).

2. There is no dispute as to the facts relevant to the cancellation of the leases. They are in documents:

Lease 1740, from the Territory to James F. Woods, appellee's assignor, was dated December 29, 1925, and was for a term of 21 years. It contained the following provisions (R. 35-36):

"It Is Mutually Agreed, That at any time or times during the term of this lease, *the land demised,* or any part or parts thereof, *may at the option of the Lessor,* on behalf of the Territory of Hawaii, or any person or persons, corporation or corporations, *be withdrawn from the operation of this lease* for homestead or settlement purposes, or for storing, conserving, transporting and conveying water for any purpose, or for reclamation purposes, or for forestry purposes, or for telephone, telegraph, electric power, railway or roadway purposes, or *for any public purpose,* or for sale for any purpose for which land may be sold under the provisions of Section 73 of the Hawaiian Organic Act as now or hereafter amended, and possession resumed by the Lessor, *in which event the land so withdrawn shall cease to be subject to the terms, covenants and conditions of this lease,* and the rent hereinabove reserved shall be reduced in proportion to the value of the part so withdrawn." [Emphasis supplied.]

Under date of July 2, 1942, the Territory's Commissioner of Public Lands wrote appellees as follows (R. 34):

> Please be informed that request has been made by Lieutenant General Delos C. Emmons, by letter dated June 17, 1942, to Governor J. B. Poindexter, that all of the government land of Kahanahaiki and Makua in Makua Valley, Waianae, Oahu, be made immediately available to the Army for war purposes.
>
> As the greater portion of the land in Makua Valley is covered by General Lease No. 1740 held

> by the L. L. McCandless Estate, wherein said lease provision is made for the withdrawal of any or all of the land covered thereby whenever it is required for any public purpose, therefore, pursuant to the request of Lieutenant General Delos C. Emmons, all of the land * * * covered by General Lease No. 1740 is hereby withdrawn from the operation thereof for public purpose to wit: For use by the Army for war purposes.
>
> General Lease No. 1740 is hereby cancelled effective June 29, 1942, the date to which rent under this lease has been paid.

Lease 1741, also from the Territory to appellees' assignor, began and was to have ended at the same times as No. 1740. It contained the same cancellation clause (R. 36). It was cancelled as of December 29, 1942, by a letter dated July 27, 1942, the first two paragraphs of which were the same as those of the letter cancelling Lease 1740 (R. 37.)[3]

3. The facts in respect of the Government's claim of set-off are as follows:

When the ranch was moved from the leased lands, Mr. Marks requested that the Army construct certain structures on the fee land (R. 102, 107, 184). In consequence, the Army built there certain dwellings and auxiliary facilities (R. 181-182) at an estimated

---

[3]The third paragraph stated that December 29, 1942, was fixed as the cancellation date because rent had been paid to that date and there was no provision in law for a refund. It added that the Army, however, required immediate possession and asked appellees to sublease to the Army until the cancellation date (R. 37). Apparently this was done. The Army reimbursed appellees for the rent it had paid for the six months (R. 117).

cost for material and labor of $16,587.50 (R. 183). Mr. Marks testified that the estimate was "a fair evaluation of what they [the Army] put in" (R. 324). On June 30, 1949, the parties stipulated that just compensation for certain land condemned in 1942 was $65,000 (R. 24-26, 112). Mr. Marks testified that he had proposed a substantially higher figure than the Government was willing to offer originally and that in arriving at his figure he took into account the improvements made by the Army (R. 322-323). He did not testify—and Government counsel denied (R. 109)—that the amount *agreed upon* was computed on this basis.

The trial Court found:

> That on December 7, 1941, military personnel of the defendant entered into possession of plaintiffs' ranch and thereafter occupied the entire premises, disrupting plaintiffs' ranching operations; that upon the initial entry only a small number of troops occupied portions of the ranch premises along the coastline, but subsequently in the year 1942, a substantial number of military personnel was deployed throughout the premises together with their equipment; that the military personnel so entering upon the plaintiffs' premises were not engaged in combat activities. (Fdg. 4, R. 15).
>
> That as a direct result of the activities of the military personnel on the premises, fences, paddocks and corrals were destroyed and caused [sic] livestock of plaintiffs to be dispersed throughout the countryside which resulted in damage to the plaintiffs as follows:

(a) 287 head of cattle lost	$12,915.00
(b) Cost to plaintiffs of recovering stray cattle	2,079.00
(c) 200 pigs	3,000.00
(d) 2 horses	250.00
(e) Loss of 500 bags, 400 bags of algaroba beans and 200 redwood posts	190.00
(f) Value of General Leases 1740 and 1741 for 4½ years	41,460.29
(g) Rental value of house and guest cottage	6,000.00
Total	$65,894.29

(Fdg. 5, R. 15-16.)

That the injuries and damages and loss of personal property and loss of said leaseholds did not arise out of the combat activities of the military personnel of the United States. (Fdg. 6, R. 16.)

That the construction by the United States of certain improvements on land owned in fee simple by the Estate of L. L. McCandless was made without reference to the claim, the subject matter of this action, and is irrelevant to plaintiffs' recovery herein and that defendant has failed to establish said set-off by a preponderance of the evidence and it is therefore denied. (Fdg. 7, R. 16.)

Its material conclusions of law were:

That the occupancy and possession of the lands described in General Leases No. 1740 and 1741

was [sic] without lawful authority and that the action of the Commissioner of Public Lands purporting to withdraw said leases for the use of military personnel did not constitute a withdrawal for public purposes of the Territory of Hawaii as provided in the Hawaiian Organic Act and the leases referred to and that plaintiffs are entitled to just compensation for the taking of said leaseholds. (Concl. 2, R. 17.)

The Court having found that plaintiffs have established the allegations of the amended complaint by a preponderance of the evidence and having further found that defendant failed to establish its set-off that therefore judgment should be entered in favor of plaintiffs and against defendant in the sum of $65,894.29. (Concl. 3, R. 17-18.)

Judgment was accordingly entered on April 19, 1950 (R. 18-19). It was modified in a particular here immaterial on April 25 (R. 19-20). This appeal followed (R. 20).

SPECIFICATION OF ERRORS.

The statement of the points relied on by the United States on its appeal (R. 397-399) may be summarized as follows:

The District Court erred:

1. In holding that the plaintiffs' claim for loss of personal property did not fall within the prohibition of the jurisdictional act against an award for losses "which arose out of the combat activities of military personnel of the United States."

2. In holding that the occupancy and possession by the United States of the lands described in General Leases No. 1740 and No. 1741 was without lawful authority.

3. In denying the claim of the United States for a set-off to the extent of the value of buildings and other facilities which it constructed on lands of appellees.

4. In awarding appellees the sum of $18,434.00 for loss of personal property and $47,460.29 for loss of the leaseholds together with interest on those amounts.

ARGUMENT.

I.

THE DAMAGES TO THE PERSONAL PROPERTY AROSE OUT OF THE COMBAT ACTIVITIES OF MILITARY PERSONNEL OF THE UNITED STATES.

As the statement shows (pp. 9-10, *supra*) the trial Court found "that the military personnel so entering upon the plaintiffs' premises were not engaged in combat activities" (Fdg. 4, R. 15) and "That the injuries and damages and loss of personal property and loss of said leaseholds[4] did not arise out of the

[4]The language of Findings 4 and 6 indicates that the Court treated the loss of livestock and the loss of leased areas as arising from the same cause. This was erroneous as the loss of livestock resulted from the activities of troops while the loss of leased areas was due to cancellation of the leases. Since the cancellation of leases is clearly not a "combat activity" the failure to treat these losses separately may well have resulted in not giving proper weight to the character of the activities causing the loss of livestock.

combat activities of the military personnel of the United States" (Fdg. 6, R. 16). Although couched in terms of findings, these statements are really conclusions of law. This is evident from the fact that there was no dispute as to the time, physical nature, and purpose of the activities causing the damage. Thus the purported finding involves only the construction of the term "combat activities."

Combat activities are generally understood to be those activities closely connected with hostilities. This Court has construed the phrase "combatant activities" in the Federal Tort Claims Act.[5] *Johnson v. United States,* 170 F. (2d) 767 (1948). In that case the Court stated at page 770:

> "'Combat' connotes physical violence; 'combatant', its derivative, as used here, connotes pertaining to actual hostilities; the phrase 'combatant activities', of somewhat wider scope, and superimposed on the purpose of the statute, would therefore include not only physical violence, but activities both necessary to and in direct connection with actual hostilities. * * *"
>
> "The rational test would seem to lie in the degree of connectivity. Aiding others to swing the sword of battle is certainly a 'combatant activity', but the act of returning it to a place of safekeeping after all of the fighting is over cannot logically be catalogued as a 'combat activity'."

It is worthy of note that the phrases "combat activities" and "combatant activities" were used inter-

[5]Excepted from the Act is "any claim arising out of the combatant activities of the military or naval forces, or Coast Guard, during time of war" 28 U.S.C.A. sec. 2680(j).

changeably by the Court in the above-quoted discussion and correctly so because when used as adjectives "combat" and "combatant" are synonymous. Webster's New International Dictionary (2d ed. unabridged). The jurisdictional Act here (pp. 2-3, *supra*) was passed within two years after the Federal Tort Claims Act. The exception provisos are linguistically indistinguishable. It follows that they must be given the same legal effect. Under the test of connectivity stated by this Court, the activities disclosed by the record here are clearly "combat activities."

The trial Court found: "That as a direct result of the activities of military personnel on the premises, fences, paddocks and corrals were destroyed and caused livestock of plaintiffs to be dispersed throughout the countryside * * *" (Fdg. 5, R. 15-16, pp. 9-10, *supra*). These activities occurred as stated in the complaint on December 7, 1941 "and immediately subsequently" (R. 12). The evidence is consistent with this allegation of the complaint. Thus, when Marks first arrived on the scene it was in his own words "about ten days" after the bombing of Pearl Harbor (R. 47). As the statement points out (p. 6, *supra*) it is clear that by this time the damage had been done (R. 47-49).

During the ten days following the attack on Pearl Harbor emergency conditions existed in Hawaii. This Court stated in *Ex parte Zimmerman,* 132 F. (2d) 442, 445 (1942), certiorari denied 319 U.S. 744 (1943):

"The courts judicially know that the Islands, in common with the whole Pacific area of the United States, have continued in a state of the gravest emergency; and that the imminent threat of a resumption of the invasion persisted. In the months following the 7th of December the mainland of the Pacific coast was subjected to attacks from the sea. Certain of the Aleutian Islands were invaded and occupied. And as late as the early summer of 1942 formidable air and naval forces of Japan were turned back at Midway from an enterprise which appeared to have Hawaii as its ultimate objective."

The purpose of the activities of the men causing the destruction of fences was directly connected with the attack on December 7, 1941. Witnesses for both parties testified that another attack was anticipated (R. 139-141, 194). The small group of men were engaged in patroling, stringing barbed wire, and preparing gun emplacements for the purpose of repelling the expected attack (R. 274, 275). These were not training activities because the area was not developed into a training area until late in 1942 (R. 277, 278). Neither were they long range defensive operations. Such operations require heavy equipment and it was not till later that a road was built allowing vehicles to enter the area (R. 279).

Thus the record discloses clearly that the activities of military personnel which caused the damage to personal property occurred on and within ten days after the attack on Pearl Harbor, that the activities were emergency measures to repel an expected re-

newal of the attack, and finally that the area was a combat zone. The trial Court erred in holding they were not "combat activities" within the meaning of the jurisdictional Act.

The Court's attention is invited to a sentence in the report of the committee of the House of Representatives favorably reporting the bill which became the Jurisdictional Act. H. Rept. 2063, 80th Cong., 2d sess. Therein, the committee stated (p. 4) that the provision dealing with "combat activities" seemed "unnecessary as no evidence was presented to your committee of any 'combat activities', as the term is generally understood, of military personnel in the areas in question." This expression is not to be taken as showing or having any tendency to show that the activities which caused the losses involved in this suit were not combat activities.

The report was based on a subcommittee hearing held October 16, 1945, almost four years after the activities in question. Only representatives of appellees appeared. As the report states (p. 3): "There is nothing in the transcript of the testimony taken in Honolulu with regards to this claim to indicate that the Army was present or that it made any effort to present any evidence whatever such as that which the Secretary [of War] states is contained in the Department's files."

It is evident that as a result the subcommittee was not accurately informed as to the facts causing the damages. Thus the report states (p. 2): "On that date, [Dec. 7, 1941] following the bombing of Pearl

Harbor, and in defensive operations against possible Japanese invasion, United States Army contingents, *including artillery, swarmed over the lands* owned in fee simple or under lease by the said McCandless estate." (Emphasis supplied.) This clearly implies large numbers. But the record shows and the Court found that only a small number of troops were in the area at the time the activities occurred which caused the loss of livestock (R. 277-278, Fdg. 4, R. 15). There was no testimony of any artillery brought into the area immediately after December 7, 1941. When the first men arrived they didn't have so much as a machine gun. The guns did not arrive for two months (R. 132). The report further states that "the United States Army did engage in defensive operations, moving in artillery and military personnel, *setting up camps, roads,* etc." (Emphasis supplied.) The facts brought out at the trial were that the area was not developed into a training area till late 1942 (R. 277, 288) and it was not until later that a road was built so that small three-ton vehicles could get into the area (R. 279). It is thus clear that the activities brought to the attention of the committee occurred from two to six months after those which caused the loss of livestock for which this suit was brought and that the report did not purport to characterize these earlier acts.

II.

THE LEASES WERE LAWFULLY CANCELLED.

The trial court held that appellees were entitled to compensation for the lands covered by the two leases on the ground that withdrawal of the land for the use of the Army "did not constitute a withdrawal for public purposes of the Territory of Hawaii as provided in the Hawaiian Organic Act" and hence that the consequent possession of the lands by the United States was illegal (R. 17, p. 11, *supra*). Pursuant to this holding, it assessed against the United States $47,460.29 damages (Fdg. 5(f)(g), R. 16, p. 11, *supra*). Its error is manifest.

A. The withdrawal was authorized by the Organic Act.

Section 91 of the Organic Act, approved April 30, 1900, 31 Stat. 159, 48 U.S.C. sec. 511, provides:

> Except as otherwise provided, the public property ceded and transferred to the United States by the Republic of Hawaii, under the joint resolution of annexation * * * shall remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii.

Admittedly, the land covered by the two leases was ceded to the United States by the Republic of Hawaii, i.e., the United States had title thereto. But by virtue

of section 91 the land was to remain in the possession and control of the Territory "until * * * taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii." It *was* taken for the use of the Army for war purposes. Obviously, therefore, the consequent possession by the United States was lawful and appellees were not entitled to be compensated for the cancellation of the leases.

As section 91 makes plain, the Territory possessed the lands at the will of the United States. The Territory could not of course grant the appellees any more than it had. In what must be deemed needless affirmation of this rudiment, it inserted in each lease the provision that "the land demised * * * may at the option of the Lessor * * * be withdrawn from the operation of this lease * * * for any public purpose * * *" (R. 35, p. 7, *supra*). By this language the Territory protected itself in the event that, as here, the United States asserted its rights.

Apparently the erroneous holding was induced by appellees' contention below that at the time the leases were made the Organic Act allowed the Territory to withdraw lands for local purposes but not for the use of the national government (see R. 30-31). The argument in support of this contention ignores section 91 and rests on the fact that prior to the Act of August 21, 1941, 55 Stat. 658, another section of the Organic Act, section 73(q), 48 U.S.C. sec. 677, provided that: "All orders setting aside lands for forests or other

public purposes, or withdrawing the same, shall be made by the Governor, and the lands while so set aside for such purposes may be managed as may be provided by the laws of the Territory," and that the 1941 Act added to the foregoing sentence the following words: "the provisions of this section may also be applied where the 'public purposes' are the uses and purposes of the United States, and lands while so set aside may be managed as may be provided by the laws of the United States." Appellees' conclusion was that the amendment shows that until its enactment leased public lands could be withdrawn only for local purposes.

There is no basis for this conclusion. Putting aside the consideration that such a construction of unamended section 73(q) would by mere implication qualify and contradict the unequivocal terms of section 91, it is manifest that the 1941 amendment lacks the significance attributed to it by appellees. Rather, contrary to their contention, the passage of the amendment confirms—if that were necessary—the meaning of section 91. These things are shown by the committee reports recommending the amendment. H. Rep. No. 831, S. Rep. No. 576, 77th Cong., 1st sess. The House Report says—and the Senate Report repeats—the following: "The purpose of the bill is to correct a technical defect in the Hawaiian Organic Act in order to give the Governor of Hawaii the same authority over public lands acquired since annexation that the Organic Act grants him over the public domain comprised in the Territory at that

time." And each report quotes a letter from the Secretary of the Interior to the Chairman of the House Committee on the Territories, in which it is said: "The purpose of this bill is to amend section 73, subsection (q) of the Hawaiian Organic Act for the purpose of authorizing the Governor of Hawaii to set aside for the uses and purposes of the United States any lands acquired by the Territory since the annexation, and in addition to those ceded by the Republic." Two things are thus apparent. The first is that the 1941 amendment pertained only to land which, unlike that here involved, was acquired since annexation. The second is that Congress was quite aware that land which, like that here involved, was ceded at the time of annexation could before passage of the amendment be withdrawn for national purposes.

B. In any event—wholly apart from Section 91—the leases themselves provided for cancellation if the lands were needed by the United States.

As the statement shows (p. 7, *supra*), the Commissioner of Public Lands and the lessees agreed that "the land demised * * * may at the option of the lessor * * * be withdrawn from the operation of this lease * * * for any public purpose."[6] The land was withdrawn "for public purpose, to wit: For use by the Army for war purposes" and the lease was cancelled (*supra,* p. 8). The Court below, concluded, however, that plaintiffs were entitled to just compensation for the taking of the leaseholds because the action "did

[6]The withdrawal power under the lease is not to be confused with the withdrawal powers of the Governor under the Organic Act.

not constitute a withdrawal for public purposes of the Territory of Hawaii as provided in the Hawaiian Organic Act and the leases referred to." This conclusion was, we submit, plainly erroneous for two reasons.

First, the conclusion of the Court below rests on the view that the lease provision permitted withdrawal only for purposes of the Territory of Hawaii rather than for use by the United States. The provision was not so limited. Instead, withdrawal was authorized for numerous purposes particularly specified "or for any public purpose." Broader language can hardly be imagined. There is no basis for ignoring this plain language by inserting after "public purpose" the restriction "of the Territory of Hawaii." Particularly, when the fee title to these lands is in the United States and the Territory is a political subdivision of the United States (*Cincinnati Soap Company v. United States,* 301 U.S. 308, 317 (1937)) a distinction between public purposes of the United States and of the Territory is not justified. In this regard the present lease is indistinguishable from private leases providing for termination if the property is taken or condemned "for any public use" or by "any competent authority" which apply when the Federal Government condemns as well as to proceedings brought by local authorities. *United States v. Honolulu Plantation Co.,* 182 F. (2d) 172 (C.A. 9, 1950), certiorari denied 340 U.S. 820 (1950); *United States v. 21,815 Square Feet of Land,* 155 F. (2d) 898 (C.A. 2, 1946).

The interest of the Territory in aiding the public purposes that may be promoted by the United States is apparent from the fact that section 91 of the Organic Act (*supra,* p. 18) embraces withdrawals for public purposes of the United States both by the President and by the Governor.

Secondly, even if the words "of the Territory" were inserted after the words "public purpose" the result would be the same. The land was withdrawn for use by the Army for war purposes. The vital interest of the Territory in successful prosecution of the war and especially in repulsion of the aggressors needs no elaboration. It is difficult to imagine a use of the land which would constitute a more important public benefit to the Territory and its inhabitants. Compare section 67 of the Organic Act approved April 30, 1900, 31 Stat. 159, 48 U.S.C. sec. 532, empowering the Governor to call upon the military and naval forces of the United States to repel invasion. Plainly, the public purposes of the Territory, as well as those of the United States, were served by use of this land to aid in the defense of the Territory. The cancellation of the lease was, therefore, authorized by its express terms.

It is submitted, therefore, that the trial Court erred in holding that the United States unlawfully occupied the leased land and that its judgment of $47,460.29 because of that occupation should be reversed.

III.

THE TRIAL COURT ERRED IN DENYING THE GOVERNMENT'S CLAIM FOR SET-OFF.

The trial Court denied the set-off claimed by the United States on the grounds that the construction work was done "without reference to the claim, the subject matter of the action, and is irrelevant to plaintiffs' recovery herein and that defendant has failed to establish said set-off by a preponderance of the evidence" (Fdg. 7, R. 16).

In so far as this denial is based on the view that a set-off claim must be relevant to the cause of action it is erroneous as a matter of law. Section 2 of the jurisdictional Act directs that the proceedings "shall be had in the same manner as in cases against the United States of which the district courts * * * have jurisdiction under * * * section 24 of the Judicial Code as amended" (p. 3, *supra*). Section 24 has been superseded by 28 U.S.C. section 1346, subsection (c) of which provides that: "The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand *whatever* on the part of the United States against any plaintiff commencing an action under this section." (Emphasis supplied.) Speaking of the similar, legally indistinguishable, provision of the statute conferring jurisdiction on the Court of Claims, the Supreme Court said: "We have no doubt but that the set-off and counterclaim jurisdiction of the Court of Claims was intended to permit the Government to have adjudi-

cated in one suit all controversies between it and those granted permission to sue it * * *." *Cherry Cotton Mills v. United States,* 327 U.S. 536, 539 (1946).

Furthermore, the rejected set-off is sanctioned by the Federal Rules of Civil Procedure. Rule 13(b), 308 U.S. 680. As the Court said in *In re Monongahela Rye Liquors,* 141 F. (2d) 864, 869 (C. A. 3, 1934): "A distinguishing feature of set-off is that it arises out of a transaction extrinsic to that out of which the primary claim arises. * * * In short a set-off rests upon a claim or demand based upon an independent cause of action. The independent nature of set-off is plainly recognized by the Federal Rules of Civil Procedure." It is therefore clear that the trial Court erred in denying the set-off on the ground it was irrelevant to the subject matter of the action.

The trial judge's further holding in the same finding that the United States had failed to establish the set-off "by a preponderance of the evidence" implies that the set-off was disputed and that the trial judge found that appellees' testimony outweighed that of the United States. But, as the Statement shows (pp. 8-9, *supra*) the United States proved—and appellees admitted—that the United States had spent $16,587.50 for appellees at their request. If appellees reimbursed the United States, they had the burden of proving the reimbursement. *Converse v. United States,* 69 C. Cls. 670, 677 (1930). They made no attempt to do so. Mr. Marks did testify that before entering the negotiations which resulted in the settlement of Civil No. 485 he

hit upon a figure which to his mind took into account the Government improvements. But he did not testify that the compromise figure reflected these improvements. And the Government denied that it did. It is therefore plain that the set-off was established beyond dispute.

CONCLUSION.

For the foregoing reasons, it is submitted that the judgment appealed from should be reversed.

Dated, January 12, 1951.

Respectfully,

A. DEVITT VANECH,
Assistant Attorney General,
FRED K. DEUEL,
Special Attorney, Department of Justice,
Honolulu, T. H.,
JOHN F. COTTER,
EDMUND B. CLARK,
Attorneys, Department of Justice,
Washington, D. C.,
Attorneys for Appellant.